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SUPREME COURT, U.S.

NO. 82-6645

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BUSTER FRANKLIN MERRELL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL D. BORMAN

FEDERAL DEFENDER OFFICE
600 Woodward Avenue
Detroit, Michigan 48226
Telephone: (313) 961-4150

Counsel for Petitioner

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QUESTION PRESENTED

WHETHER ONE "CONDUCTS" A GAMBLING BUSINESS UNDER 18 U.S.C. §1955 BY MERELY SERVING COFFEE DURING A DICE GAME AND CLEANING UP AFTER THE GAME HAS ENDED?

FEDERAL STATUTE IN ISSUE

Title 18 U.S.C. §1955

§1955. Prohibition of illegal gambling businesses.

(a) Whoever conducts, finances, manages supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section--

(1) "illegal gambling business" means a gambling business which--

(i) is a violation of the law of a State or political subdivision in which it it is conducted;

(ii) involved five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BUSTER FRANKLIN MERRELL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, BUSTER FRANKLIN MERRELL, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 4, 1983.

OPINION BELOW

The opinion of the court of appeals (App. 1) is reported at ___F.2d___ (6th Cir. 1983); #82-1182 (March 4, 1983). (Appendix)

JURISDICTION

The opinion of the court of appeals was entered on March 4, 1983. This petition is being filed within sixty (60) days of that date as required by Supreme Court Rule 20.1. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. The Government indicted Defendant Buster Franklin Merrell and twelve other persons in a two count indictment charging (1) conspiracy to conduct an illegal gambling operation in violation of 18 U.S.C. §371, and (2) conducting an illegal gambling operation in violation of 18 U.S.C. §1955 and §2(a). The essence of the indictment was that the thirteen defendants had been conducting a dice or craps game in a house located at 19733 Omira, Detroit, Michigan.

2. Eight of the defendants entered a plea of guilty before the Honorable Robert E. DeMascio, to Count 2, conducting an illegal gambling operation. These eight individuals included the operator of the game, the owner of the house, the watchman/doorman, and the dealers or stickmen.

3. The five remaining defendants proceeded with a bench trial.

4. Judge DeMascio acquitted four of the defendants on the ground that they were mere bettors or participants. Judge DeMascio convicted Defendant Merrell of Count 2, conducting an illegal gambling operation, but acquitted him on the Count I conspiracy charge.

5. In finding Defendant Merrell guilty on Count 2, Judge DeMascio stated:

> The evidence is very clear that Mr. Merrell is in fact an employee of Mr. Salem. It's very clear from the evidence that his job is to serve coffee, clean up, get that place ready for the next day's game . . . TR. 615
>
> I have no joy in convicting Mr. Merrell, but I cannot make the law. I can only anticipate what the Sixth Circuit will do and I think it will

> follow U.S. v. Tucker, and hold . . . that it is a broad statute, that it does and intends to bring within its ambit anyone who participates in any way in a gambling operation.
>
> I am going to find the defendant Merrell, guilty of count 2 of the indictment. I see no evidence that he participated knowingly and willfully in any conspiracy. TR. 616.

6. The opinion of the United States Court of Appeals for the Sixth Circuit, filed March 4, 1983 rejected the recent decision of the Tenth Circuit in United States v. Boss, 671 F.2d 396 (10th Cir. 1982), which had held that the reach of the statute was limited to conduct necessary to the operation of a gambling business. The Tenth Circuit held that the term "conduct" did not apply to the waitresses who served drinks to gamblers at the dice table.

The Sixth Circuit in affirming Petitioner's conviction, held "that one conducts a gambling business if that person performs any act , duty or function which is necessary or helpful in operating the enterprises." (Slip Opinion p. 4) (emphasis in opinion).

REASONS FOR GRANTING THE PETITION

Two special and important reasons as set forth in the Rules of the Supreme Court warrant the granting of the writ of certiorari.

1. Per Rule 17.1(a), there is a direct conflict between the instant decision of the United States Court of Appeals for the Sixth Circuit and the recent decision of the United States Court of Appeals for the Tenth Circuit, United States v. Boss, supra.

The Sixth Circuit conceded that its decision was in direct conflict with Boss:

> The Boss court reasoned that the statute only reached conduct strictly necessary to the operation of a gambling business. To extend the statute further allegedly might ensnare persons that Congress never intended. Since a gambling enterprise can operate with-

> out waitresses serving drinks to bettors, the waitresses were not conducting a gambling business within the meaning of the statute.
>
> Merrell argues that under the Boss necessity test, runners, dealers, guards and the like may be prosecuted because such persons either are integral to the efficient operation of a gambling enterprise or provide security and protection. A gambling business could not long operate without them. Conversely, such an enterprise could easily function without the services or waiters or janitors. Merrell therefore asserts that the conviction should be reversed.
>
> The major flaw in appellant's argument is that the strict necessity test has only been adopted by the Boss court. The prevailing rule is that one "conducts" a gambling business if that person performs any act, duty or function which is necessary or helpful in operating the enterprise. See United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir. 1981); United States v. Tucker, 638 F.2d 1292, 1296 (5th Cir.), cert. denied, 454 U.S. 833 (1981); United States v. Greco, 619 F.2d 635, 638 (7th Cir. 1980); United States v. Bennett, 563 F.2d 879, 882 n.4 & 773 (8th Cir. 1977). Merrell's actions clearly aided the gambling operation involved here. By serving coffee, appellant helped the bettors to continue wagering without interruption. See Tucker, supra at 1296; Bennett, supra at 883. By cleaning up and preparing the gambling area for future sessions, appellant helped to provide an attractive place for bettors to congregate in order to wager. In light of the authorities from the fifth, seventh and eighth circuits, we hold that persons who regularly aid gambling enterprises should be subject to prosecution under section 1955 even though their conduct may not be strictly necessary to the success of such business. Since the Boss case ruled to the contrary, we decline to follow it. Slip op. pp. 3-4 (emphasis added).

Thus, the instant Sixth Circuit decision, which is comparable to Boss on the facts, waiter/janitor--waitress, is in direct conflict with Boss on the law.

On the other hand, the fact situations in the decisions of the Fifth and Seventh and Eighth Circuit Courts of Appeal, cited as authority by the Sixth Circuit, are not similar to the instant fact situation or that in Boss. In each of those cited

decisions, the relevant individuals performed an integral function of the gambling itself or a security type function crucial to the operation of the illegal enterprise.

In United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir. 1981), the relevant individuals acted as security guards, in addition to serving food and drinks and cleaning up.

In United States v. Tucker, 638 F.2d 1292, 1296, (5th Cir.), cert. denied, 454 U.S. 833 (1981), the relevant individuals made change for gamblers to use in placing bets in a cash game in addition to serving drinks and delivering phone messages to them.

In United States v. Greco, 619, F.2d 635, 638 (7th Cir. 1970), the relevant individual accepted lay off bets.

In United States v. Reeder, 614 F.2d 1179, 1182-84 (8th Cir. 1980), the relevant individuals accepted and played lay-off bets, obtained line information, and payed off bets.

In United States v. Bennett, 563 F.2d 879, 883 (8th Cir. 1977), the relevant individuals acted as a doorman and as a guard and lookout.

Thus, neither the Fifth, Seventh nor Eighth Circuit Courts of Appeal were required to deal with the issue, resolved with direct conflict between the Tenth Circuit in Boss and the Sixth Circuit in the instant case: Whether a mere janitor or waitress "conducts" a gambling operation under 18 U.S.C. §1955.

2. Per Rule 17.1(c), the Sixth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, to wit: whether the term "conduct" in 18 U.S.C. §1955 encompasses any act, duty or function which is necessary or helpful to a gambling enterprise.

This Court has not interpreted the reach of the term "conduct" in 18 U.S.C. §1955, and both the plain meaning of the words of the statute and the legislative history support the

restrictive interpretation of the Tenth Circuit in United States v. Boss, supra.

In the case of Sanabria v. United States, 437 U.S. 54, 70 n.26 (1978), this Court noted, in dicta in a footnote, that "numerous cases have recognized that 18 U.S.C. §1955 proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor."

None of the cases referred to dealt with an individual such as a waiter or janitor, who is neither directly participating in the gambling business, nor facilitating the illegality by acting as a guard or doorman to exclude police or individuals likely to reveal its existence.

In United States v. Dimuro, 540 F.2d 503, 508 (1st Cir. 1976), cert. den. 429 U.S. 1038 (1977), the relevant individuals made and accepted lay off bets.

In United States v. Leon, 534 F.2d 667, 676 (6th Cir. 1976), the relevant individuals accepted bets for the gambling operation.

In United States v. Brick, 502 F.2d 219, 225 (8th Cir. 1974), the relevant individuals made and accepted lay off bets.

In United States v. Smaldone, 485 F.2d 1333, 1339 (10th Cir. 1973), cert. den. 416 U.S. 936 (1974), the relevant individuals included bookmakers, runners, phone men who received bets, relay men who consolidated betting information, and bookkeepers for the gambling operation.

In United States v. Hunter, 478 F.2d 1019, 1022 (7th Cir.), cert. den. 414 U.S. 857 (1973), the relevant individuals were sellers of the lottery slips, guards, runners, and the night watchman.

In United States v. Ceraso, 467 F.2d 653, 656 (3d Cir. 1972), the relevant individuals took bets and gave information on the betting line, provided financing for the operation, and managed the operation.

In United States v. Becker, 461 F.2d 230, 232 (2d Cir. 1972), the relevant individuals were runners or agents of the business.

Thus the footnote discussion in Sanabria is not controlling of the instant petition for two reasons:

1. The discussion merely referred to Court of Appeals decisions and did not incorporate them as holding or even dicta.

2. All of the Court of Appeals decisions cited in the footnote involved individuals who participated in some degree of an illegal gambling business.

Accordingly, there is a need for this Court to interpret the reach of the term "conduct" under 18 U.S.C. §1955, because of the directly conflicting interpretations in the Court of Appeals decisions in the instant case, and in United States v. Boss, supra.

Under the broad interpretation of the Sixth Circuit, anyone who performs a function helpful in any way to a gambling operation is a proper subject for conviction under 18 U.S.C. §1955 for conducting a gambling operation. This would sweep in the milkman who delivers a quart of milk to a house that he knows is running an illegal dice game. Such an open-ended interpretation is not justified by either the words of the statute or the legislative history.

This Court has recently reiterated that in construing a statute, the words of the statute and the legislative history are of paramount importance.

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language. If the language is inambiguous, ordinarily it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. Dickerson v. New Banner Institute, 103 S.Ct 986, 990 (1983), (citations omitted).

In the instant case, the coverage of Title 18 U.S.C. §1955 is limited to the following individuals--persons who "conduct, finance, manage, supervise, direct or own all or part of an illegal business."

The term "conduct" is defined in Webster's New Collegiate Dictionary, 1973, p. 235, as:

> (1) to bring by as if by leading...
>
> (2) to carry on or out usually from a position of command or control....

All of the terms after "conduct", "finance, manage, supervise, direct or own" refer to the principal operators of these games.

Thus, the plain meaning of the statute would indicate that its sweep extends only to the principal operatives of illegal gambling businesses.

The legislative history, however, supports extending the sweep of its coverage to lower-level operations directly involved in the gambling business.

The House Report accompanying the bill that eventually became 18 U.S.C. §1511 and §1955 stated:

> The term "conduct" refers to both high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet. H.R. Rep. No. 91-1549, 91st Cong. 2d. Sess, (1970) U.S. Code Cong. & Admin. News.

The terms high level bosses and street level employees both refer to operatives of an illegal gambling business. High level bosses refers to the financiers, owners and managers of the operation. Street level employees refers to numbers runners or other types of bet-takers who are an integral part of most of the gambling businesses covered by §1955(b)(a): "pool-selling, book-making, . . . conducting lotteries, policy, bolita or numbers

games, or selling chances therein." Without street runner operatives to take the bets and make the payoffs, these gambling businesses could not exist.

The legislative history excludes from culpability "the player in an illegal game of chance"--one of the necessary components of a gambling operation, along with a manager, financier, runner or dealer. However, this exclusion of the player, does not justify imposing criminal liability on persons not involved in the gambling itself, specifically waiters, janitors or other similarly situated individuals performing non-gambling and non-security functions. These individuals do not, in any manner conduct the gambling business or promote the illegal operation by guarding the doors.

Niether the words of the statute nor the legislative history support an interpretation of §1955 to include a class of individuals never mentioned or discussed, who are in no way an integral part of the illegal gambling operation.

Thus, Petitioner contends that the interpretation of the term "conduct" by the Sixth Circuit in the instant case is contrary both the plain meaning of the words of §1955 and is not supported by the legislative history.

Petitioner proffers, in support of this Petition, the maxim repeated time and again in Supreme Court decisions: "When choice had to be made between two readings of what content Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. Williams v. United States, 102 S.Ct. 3088 (1982), citing United States v. Bass, 404 U.S. 404 U.S. 336, 347 (1971), and United States v. Universal C.I.T. Credit Corp, 344 U.S. 218, 221-222 (1952). "[A]mbiguity concerning the coverage of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971).

In addition, this Court has adopted the policy of restrictive interpretation of federal statutes which duplicate or build upon state law:

> Since there is no common law offense against the United States, the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute. Jerome v. United States, 318 U.S. 101, 104-105 (1943).

Accord, United States v. Bass, 404 U.S. 336, 346-350 (1971); Williams v. United States, 102 S.Ct. 3088, 3093 (1983).

The comprehensive coverage of gambling offenses by Michigan criminal statutes is evidenced in Count 2 of the instant indictment (Appendix) which cites to seven state provisions allegedly violated by the defendants: Michigan Compiled Laws, Sections 750.301, 750.314, 750.315, 750.157a, 750.92, 767.39.

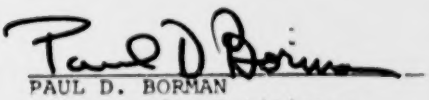
Accordingly, because the expansive interpretation of the term "conduct" by the Sixth Circuit Court of Appeals to convict a waiter/janitor at a dice game is in direct conflict with the Tenth Circuit decision in United States v. Bass, supra, and further conflicts with the plain meaning of the words of the statute, and is not supported by the legislative history, this petition raises an important question of federal law which has not been but should be settled by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FEDERAL DEFENDER OFFICE



PAUL D. BORMAN
Attorney for Petitioner
600 Woodward Avenue
Detroit, Michigan 48226
Telephone: (313) 961-4150

Dated: April 27, 1983

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BUSTER FRANKLIN MERRELL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, BUSTER FRANKLIN MERRELL, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 46.1. The petitioner proceeded in forma pauperis in this manner in both the United States District Court, Eastern District of Michigan, Southern Division, and in the United States Court of Appeals for the Sixth Circuit. His financial condition has not since improved.

Respectfully submitted,

FEDERAL DEFENDER OFFICE

PAUL D. BORMAN
Attorney for Petitioner
600 Woodward Avenue, 11th Floor
Detroit, Michigan 48226
Telephone: (313) 961-4150

Dated: April 27, 1983

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1182

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BUSTER MERRELL,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 4, 1983

Before, KENNEDY, CONTIE and WELLFORD, Circuit Judges.

CONTIE, Circuit Judge. Buster Merrell appeals his conviction under 18 U.S.C. § 1955 for conducting an illegal gambling business. He was sentenced to two years probation. We affirm.

The facts are undisputed. Between May 11, 1979 and April 19, 1980, government agents undertook surveillance of 19733 Omira, Detroit, Michigan. The authorities suspected that illegal gambling was occurring on the premises. After photographing and videotaping activity transpiring outside the address, the agents legally planted a video camera and microphone within the house and tapped two telephones. The videotape, which was the main prosecution evidence at trial, clearly indicated that an illegal dice game was being operated

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every Monday and Friday night during the time period in question.

On April 19, 1980, government agents raided the premises and arrested Merrell and others. Thirteen persons were charged with violating both 18 U.S.C. § 1955, conducting an illegal gambling business, and 18 U.S.C. § 371, conspiracy to commit the underlying substantive offense. Trial of all defendants commenced on December 14, 1981. Three days into the proceedings, eight defendants pleaded guilty. They were the lessor of the premises, the game operator, three dealers and three watchmen/doormen. The remaining five, including Merrell, waived their right to a jury trial.

The district court acquitted four of the defendants on both counts because they were mere bettors whose actions were not proscribed by section 1955. Although Merrell was acquitted of conspiracy, he was convicted of the substantive offense. The district court found that appellant performed several jobs which aided the gambling operation. For instance, Merrell regularly served coffee to bettors during gambling sessions. Immediately after these sessions, he usually stacked tables and chairs, swept the floors, cleaned ash trays and replaced the tables and chairs in preparation for future sessions. The sole issue raised on appeal is whether section 1955 makes criminal the waiters' and janitors' functions performed by the defendant.[1]

The Supreme Court has stated that section 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor." *Sanabria* v. *United States*, 437 U.S. 54, 70 n.26 (1978). The courts of appeals have also recognized that only customers are outside the purview of the statute. *See, e.g., United States* v. *Leon*, 534 F.2d 667, 676 (6th Cir. 1976); *United States* v. *Reeder*, 614

[1] The record does not indicate whether Merrell was compensated for his services. The point is insignificant because the government need not prove that appellant was paid in order to obtain a conviction. *United States* v. *Rowland*, 592 F.2d 327 (6th Cir. 1979).

2

F.2d 1179, 1182 (8th Cir. 1980). Section 1955 covers both "high level bosses and street level employees." 1970 *U.S. Code Cong. & Ad. News* 4029. Thus, this circuit has held that runners, telephone clerks, salesmen, dealers, doormen and watchmen "conduct" gambling businesses within the meaning of the statute. *Leon, supra* at 676. Since performing janitorial and service functions is not mere gambling,[2] the question is whether Merrell's actions constitute "participation" in an illegal enterprise under the *Sanabria* test.

Merrell contends that his conduct does not amount to participation. He relies primarily on *United States* v. *Boss*, 671 F.2d 396 (10th Cir. 1982), in which the tenth circuit held that waitresses whose sole function was to serve drinks both to dance hall patrons and to gamblers in an adjacent room were not subject to prosecution under section 1955. The *Boss* court reasoned that the statute only reached conduct strictly necessary to the operation of a gambling business. To extend the statute further allegedly might ensnare persons that Congress never intended. Since a gambling enterprise can operate without waitresses serving drinks to bettors, the waitresses were not conducting a gambling business within the meaning of the statute.

Merrell argues that under the *Boss* necessity test, runners, dealers, guards and the like may be prosecuted because such persons either are integral to the efficient operation of a gambling enterprise or provide security and protection. A gambling business could not long operate without them. Conversely, such an enterprise could easily function without the services or waiters or janitors. Merrell therefore asserts that the conviction should be reversed.

---

[2] The record reflects that in addition to his other activities, Merrell did gamble. The *Sanabria* exception to criminal liability only applies, however, to those whose sole role is that of bettor. Persons who wager and otherwise participate in the operation may be prosecuted because the contrary result would encourage a subterfuge, i.e., all participants could avoid liability by placing an occasional bet. *See United States* v. *Colacurcio*, 659 F.2d 684, 688 (5th Cir. 1981).

The major flaw in appellant's argument is that the strict necessity test has only been adopted by the *Boss* court. The prevailing rule is that one "conducts" a gambling business if that person performs any act, duty or function which is necessary *or helpful* in operating the enterprise. *See United States* v. *Colacurcio*, 659 F.2d 684, 688 (5th Cir. 1981); *United States* v. *Tucker*, 638 F.2d 1292, 1296 (5th Cir.), *cert. denied*, 454 U.S. 833 (1981); *United States* v. *Greco*, 619 F.2d 635, 638 (7th Cir. 1980); *United States* v. *Reeder*, 614 F.2d 1179, 1182 n.2 (8th Cir. 1980); *United States* v. *Bennett*, 563 F.2d 879, 882 n.4 & 883 (8th Cir. 1977). Merrell's actions clearly aided the gambling operation involved here. By serving coffee, appellant helped the bettors to continue wagering without interruption. *See Tucker*, *supra* at 1296; *Bennett*, *supra* at 883. By cleaning up and preparing the gambling area for future sessions, appellant helped to provide an attractive place for bettors to congregate in order to wager. In light of the authorities from the fifth, seventh and eighth circuits, we hold that persons who regularly aid gambling enterprises should be subject to prosecution under section 1955 even though their conduct may not be strictly necessary to the success of such businesses.[3] Since the *Boss* case ruled to the contrary, we decline to follow it.

Upholding the district court's judgment will not result in future convictions of persons that Congress never intended. The record clearly indicates that appellant regularly and consistently performed his duties. That fact distinguishes this case from the situation in which, for example, a mere bettor serves a drink or helps to clean up in an isolated instance. Secondly, and unlike the situation in *Boss*, Merrell regularly worked for an enterprise whose sole purpose was to promote

[3] The fifth circuit stated in *Tucker*, *supra* that persons employed by gambling enterprises on a continuous basis, and whose duties require them directly to serve gamblers, are subject to prosecution under section 1955. Appellant's conduct fits that description.

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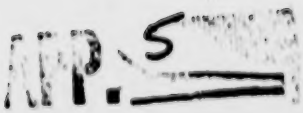
illegal wagering. Consequently, appellant cannot reasonably claim that he unknowingly or unwittingly facilitated gambling.

Since appellant knowingly and regularly aided the gambling business in question, the district court acted properly in convicting him. Accordingly, the judgment is AFFIRMED.



IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRED SALEM,
KAREN SALEM,
THEODORE TSAKIRIS,
EDWARD SARKISIAN,
JOHN PETER ELIAS,
HENRY ALLEN HILF,
CHARLES JOSEPH HONAZYN,
FRANK JOSEPH RAYMOND JR.,
WILLIAM CONSTANCE CUC,
WILLIAM CERERA,
MIKE AGEMY,
AHMED SALEM and
BUSTER FRANKLIN MERRELL,

Defendants.

CRIMINAL ACTION
NO. 81-80297

VIOLATIONS

18 U.S.C. 371, 1955
and 2(a)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(18 U.S.C. 371 - Conspiracy)

That from on or about May 11, 1979, and continuously thereafter, up to and including April 19, 1980, in the Eastern District of Michigan, FRED SALEM, KAREN SALEM, THEODORE TSAKIRIS, EDWARD SARKISIAN, JOHN PETER ELIAS, HENRY ALLEN HILF, CHARLES JOSEPH HONAZYN, FRANK JOSEPH RAYMOND JR., WILLIAM CONSTANCE CUC, WILLIAM CERERA, MIKE AGEMY, AHMED SALEM and BUSTER FRANKLIN MERRELL, did unlawfully, willfully and knowingly combine, conspire, confederate and agree together to commit an offense against the United States, to-wit: to violate Section 1955 of Title 18, United States Code.

It was a part of the said conspiracy that the Defendants would conduct, finance, manage, supervise, direct and own an illegal gambling business

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in violation of Sections 750.301, 750.314, 750.315, 750.157a, 750.167, 750.92 and 767.39 of the Michigan Compiled Laws, said gambling business involving five or more persons in its conduct, financing, management, supervision, direction and ownership, being in substantially continuous operation for a period in excess of thirty (30) days and having a gross revenue of Two Thousand Dollars ($2,000.00) or more on one or more single days.

Among the means by which the Defendants would carry out the aforesaid conspiracy were the following:

A. The Defendant FRED SALEM would manage, direct and conduct the illegal gambling business by providing casino type dice bearing the initials "FS", by arbitrating disputes, by lending money and by supervising the illegal craps game at 19733 Omira Street in the City of Detroit.

B. The Defendant KAREN SALEM would conduct the illegal gambling business by acting as a guard, lookout and doorman at the illegal craps game at 19733 Omira Street in the City of Detroit.

C. The Defendant THEODORE TSAKIRIS would conduct the illegal gambling business by permitting an illegal craps game to operate at 19733 Omira Street, Detroit, Michigan, said dwelling being owned by Defendant TSAKIRIS and by permitting telephones at that location to be used in connection with the operation of the illegal gambling business and by paying the bills for said telephones.

D. The Defendant EDWARD SARKISIAN would conduct the illegal gambling business by taking wagers from persons who attended the illegal craps game at 19733 Omira Street, Detroit, Michigan.

E. The Defendants JOHN PETER ELIAS, FRANK JOSEPH RAYMOND JR. and ARNED SALEM, would conduct the illegal gambling business by working as stickmen and dealers during the illegal craps game at 19733 Omira Street, Detroit, Michigan.

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F. The Defendants HENRY ALLEN HILF and WILLIAM CERERA would conduct the illegal gambling business by taking wagers from persons who attended the illegal craps game at 19733 Omira Street, Detroit, Michigan.

G. The Defendants WILLIAM CONSTANCE CUC and MIKE ACEMY would conduct the illegal gambling business by acting as guards, lookouts and doormen at 19733 Omira Street, Detroit, Michigan.

H. The Defendant CHARLES JOSEPH MCNAMYN would conduct the illegal gambling business by operating as a banker, exchanging money, making change and taking wagers at the illegal craps game at 19733 Omira Street, Detroit, Michigan.

I. The Defendant BUSTER FRANKLIN MERRELL would conduct an illegal gambling business by taking care of food and coffee, by cleaning up and by assisting other persons conducting the illegal gambling business, at 19733 Omira Street, Detroit, Michigan.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, in the Eastern District of Michigan, the Defendants committed the following overt acts among others:

1. On or about June 1, 1979 FRED SALEM, Defendant herein, travelled to 19733 Omira Street, Detroit, Michigan.

2. On or about August 18, 1979 FRED SALEM and WILLIAM CERERA, Defendants herein, exited 19733 Omira Street, Detroit, Michigan.

3. On or about June 2, 1979 WILLIAM CUC and KAREN SALEM, Defendants herein, exited 19733 Omira Street, Detroit, Michigan.

4. On or about August 11, 1979 THEODORE TSAKIRIS, Defendant herein, exited 19733 Omira Street, Detroit, Michigan.

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5. On or about June 12, 1979 FRED SALEM, BUSTER MERRELL, JOHN P. ELIAS, WILLIAM GEBERA and EDWARD SARKISIAN, Defendants herein, exited 19733 Omira Street, Detroit, Michigan.

6. On or about June 2, 1979 CHARLES JOSEPH MONAHYN, Defendant herein, exited 19733 Omira Street, Detroit, Michigan.

7. On or about August 11, 1979 HENRY ALLEN HILF and EDWARD SARKISIAN, Defendants herein, exited 19733 Omira Street, Detroit, Michigan.

8. On or about August 11, 1979, FRANK JOSEPH RAYMOND JR. and FRED SALEM, Defendants herein, exited 19733 Omira Street, Detroit, Michigan.

9. On or about June 9, 1979 AHMED SALEM, Defendant herein, exited 19733 Omira Street, Detroit, Michigan.

10. On or about March 29, 1980 MIKE AGEMY, Defendant herein, exited 19733 Omira Street, Detroit, Michigan.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

(18 U.S.C. 1955 - Illegal Gambling Business)
(18 U.S.C. 2(a) - Aiding and Abetting)

That from on or about the 11th day of May, 1979, and continuing up to and including the 19th day of April, 1980, in the Eastern District of Michigan, the Defendants, FRED SALEM, KAREM SALEM, THEODORE TSAKIRIS, EDWARD SARKISIAN, JOHN PETER ELIAS, HENRY ALLEN HILF, CHARLES JOSEPH MONAHYN, FRANK JOSEPH RAYMOND JR., WILLIAM CONSTANCE CUC, WILLIAM GEBERA, MIKE AGEMY, AHMED SALEM and BUSTER FRANKLIN MERRELL, did knowingly and willfully conduct, finance, manage, supervise, direct and own, and aid and abet one another in conducting, financing, managing, supervising, directing, and owning an illegal gambling business; said gambling business being in violation of Sections 750.301, 750.314, 750.315, 750.157a, 175.167, 750.92 and 767.39 of the Michigan Compiled Laws, and said gambling business having been in substantially

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continuous operation for a period in excess of thirty (30) days, and having a gross revenue of Two Thousand Dollars ($2,000.00) or more on one or more single days.

All in violation of Title 18, United States Code, Sections 1955 and 2(a).

THIS IS A TRUE BILL.

FOREPERSON

RICHARD A. ROSSMAN
United States Attorney

STANLEY MARCUS
Special Attorney
Detroit Strike Force
940 Federal Building
Detroit, Michigan 48226
Telephone: 313-226-7252

DATED: May 21, 1981

APP. 10

No. 82-6645

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FILED
JUN 24 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BUSTER FRANKLIN MERRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-6645

BUSTER FRANKLIN MERRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner contends that his involvement in a gambling enterprise did not constitute "conducting" an illegal gambling business within the meaning of 18 U.S.C. 1955.

1. Following a bench trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. 1/ He was sentenced to two years' probation. The court of appeals affirmed (Pet. App. 1-5).

1/ Petitioner was charged, together with twelve co-defendants, with both the substantive offense and conspiracy, 18 U.S.C. 371. After three days of their joint jury trial, eight co-defendants (the lessor of the gambling premises, the game operator, three dealers and three watchmen) pleaded guilty. Petitioner and four co-defendants then waived a jury for the rest of the trial. The trial court convicted petitioner on the substantive charge, acquitted him on the conspiracy charge, and acquitted the remaining co-defendants "because they were mere bettors whose actions were not proscribed by Section 1955" (Pet. App. 2).

The evidence at trial showed that between May 11, 1979, and April 19, 1980, the FBI maintained surveillance of the premises at 19733 Omira in Detroit because of suspected illegal gambling. The surveillance entailed court-authorized videotaping and recording of activity and conversations occurring inside the premises, and "clearly indicated that an illegal dice game was being operated every Monday and Friday night during the time period in question" (Pet. App. 1-2). Petitioner "regularly served coffee to bettors during gambling sessions," and he "usually stacked tables and chairs, swept the floors, cleaned ash trays and replaced the tables and chairs in preparation for future sessions" (id. at 2). 2/

On appeal, petitioner's sole contention was that those activities did not justify his conviction. He relied on language in United States v. Boss, 671 F.2d 396, 400 (10th Cir. 1982), stating that a person must perform a "necessary function for the illegal gambling business" in order to be convicted under Section 1955. The court of appeals rejected petitioner's argument, concluding (Pet. App. 3-4) that the "prevailing rule is that one 'conducts' a gambling business if that person performs any act, duty or function which is necessary or helpful in operating the enterprise" (emphasis in original) (citations omitted). The court, moreover, distinguished Boss on its facts (id. at 4-5).

2. Contrary to petitioner's argument (Pet. 3-11), the decision of the court of appeals was correct, does not conflict with Boss, and does not warrant further review.

2/ The only defense witness, one of petitioner's co-defendants, confirmed that petitioner engaged in the activities described above and testified that petitioner "possibly" acted as a dealer as well (Tr. 490-492).

First, the decision below is consistent with the principle recognized by this Court that Section 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor" (Sanabria v. United States, 437 U.S. 54, 70-71 n.26 (1978)), and with the decisions of the Fifth, Seventh and Eight Circuits on which the court of appeals relied. See United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); United States v. Tucker, 638 F.2d 1292, 1296 (5th Cir.), cert. denied, 454 U.S. 833 (1981); United States v. Greco, 619 F.2d 635, 638 (7th Cir. 1980); United States v. Reeder, 614 F.2d 1179, 1182 n.2 (8th Cir. 1980); United States v. Bennett, 563 F.2d 879, 882 n.4 & 883 (8th Cir.), cert. denied, 434 U.S. 924 (1977). 3/

Second, it is by no means certain that this case conflicts with the Tenth Circuit's decision in Boss. While the court in Boss expressed disagreement with the "necessary or helpful test," it distinguished cases adjudicated under that standard and approved the results reached in those decisions. (671 F.2d at 400 & n.5.)

In any event, this case presents no occasion for resolution of any conflict with Boss because, as the Sixth Circuit recognized, the two cases are factually distinguishable. Boss involved waitresses whose primary function was to serve drinks to the 200 to 400 patrons of a large dance hall and whose sole connection with the gambling business was serving drinks to the 25 to 30 dice players in a small adjoining "gambling room." The court concluded that, under those circumstances, the waitresses' relationship to the illegal gambling was "too attenuated for them to be counted * * * as persons who 'conduct' * * * the gambling business" under Section 1955 (671 F.2d at 402).

3/ This Court has recently denied certiorari in two cases in which petitioners alleged a conflict with Boss. James v. United States, No. 82-1262, cert. denied (Apr. 25, 1983); Rossano v. United States, No. 82-124, cert. denied (Oct. 18, 1982). In addition, the petition for a writ of certiorari in Colacurcio, supra, was denied shortly after the Tenth Circuit's decision in Boss.

Here, by contrast, petitioner's relationship with the gambling operation was much more substantial and direct. He not only served coffee to the gamblers, but he also prepared the premises for future gambling sessions. 4/ Moreover, as the court of appeals observed (Pet. App. 4-5), "unlike the situation in Boss," -- where the waitresses' primary obligation was to serve customers who had no connection with the illegal gambling -- petitioner "regularly worked for an enterprise whose sole purpose was to promote illegal wagering" and he "cannot reasonably claim that he unknowingly or unwittingly facilitated gambling."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1983

4/ As noted above (note 2, supra), there was also testimony from a co-defendant that petitioner "possibly" served as a dealer as well.

No. 82-6645

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CLERK

OCTOBER TERM, 1982

BUSTER FRANKLIN MERRELL, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

PAUL D. BORMAN
Federal Defender Office
600 Woodward Avenue
Detroit, Michigan
(313) 961-4150

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6645

BUSTER FRANKLIN MERRELL, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner replies as follows to the Memorandum of the United States in Opposition (hereinafter Government's Memorandum):

1. The Government's Memorandum on Page 2 states: "The court, [Sixth Circuit] moreover, distinguished Boss on its facts (Id at 4-5)."

In fact, the court stated: "The major flaw in appellant's argument is that the strict necessity test has only been adopted by the Boss court . . . Since the Boss case ruled to the contrary, we decline to follow it." Id at 4.

Thus the decision of the court of appeals does conflict with Boss, and does warrant further review.

2. The Government's Memorandum on Page 2, footnote two, states that a co-defendant confirmed that Petitioner served coffee and acted as a janitor, and "testified that petitioner 'possibly' acted as a dealer as well (TR. 496-492)." The Government's Memorandum repeats this latter claim again on Page 4 in footnote four.

In fact there was no evidence at trial that Petitioner ever acted as a dealer. "The "possibly" testimony cited by the Government was the only testimony in the trial that alluded to the possibility that Petitioner had engaged in a gambling function. The testimony was as follows:

Q When the three dealers -- I am talking about Mr. Raymond, Mr. Haifi, Jimmy Salem, when they weren't there, who acted as dealer?

A (Gebara) Pardon me?

Q Who acted as dealer if these three individuals that night as dealer were not there?

A They were always there. Two of them always there, one or two of them. Lots of times they dealt the game with one dealer.

Q One dealer?

A Only used two dealers when the game got real busy.

Q Did Mr. Merrell act as dealer?

A I never saw him or I can't recall seeing him. I can't recall seeing him. It's possible, if you say he did.

Q I am not saying he did, sir. I am asking you.

A I don't recall.

A Could he have acted as dealer when you were there, yes or no?

A Possibly. (TR. 491-492)

This "possibly" testimony was ignored both by the trial judge in his findings of fact and by the court of appeals in its opinion. Thus neither footnotes two and four of the Government's Memorandum nor the testimony referred to are worthy of consideration with regard to the instant petition.

3. The Government's Memorandum on Page 3, footnote 3, states that the "Court has recently denied certiorari in two cases in which petitioners alleged a conflict with Boss. Jones v. United States, No. 82-1262, cert. denied (April 25, 1983); Rossano v. United States, No. 82-124, cert. denied (October 13, 1982)."

In fact, neither case involved facts akin to Boss and the instant case.

In Jones, the issue was whether an individual who personally owned 40% of the gambling operation (with his wife's interested added, they owned more than 50%) "conducted" the enterprise. (Facts supplied by Frank Haddad, Esq., attorney for Petitioner Jones, phone conversation, June 13, 1983).

In Rossano, where only the two major operators were presented, the issue was whether five or more individuals had "conducted" the gambling operation. Additional persons labelled by the Government as "conducting" were doormen, persons who paid protection money to police, a cook and a janitor. (Facts supplied by Carmine Nasuti, Esq., attorney for Petitioner Rossano, phone conversation, June 13, 1983). However, because the operators, doormen and persons paying protection money added up to more than five persons, the issue of whether a cook or janitor "conducts" a gambling operation was not clearly before the Supreme Court.

Thus, in neither Jones nor Rossano was there a direct conflict with Boss. In the instant case there is a direct conflict with Boss: Waiter/janitor included as one who "conducts" in the instant case; waitress not included in Boss.

4. The Government's Memorandum on page 3 misstates the holding in Boss in an attempt to support its argument that factual distinctions support the conflicting decisions. In fact, the

distinction between the duties of the waitress in Boss and Petitioner in the instant case does not eliminate the direct conflict between the two decisions.

The Government asserts that the court in Boss concluded that because the waitresses' "primary function was to serve drinks to the 200 to 400 patrons of a large dance hall and whose sole connection with the gambling business was serving drinks to the 25 to 30 dice players in a small adjoining 'gambling room'", that "the waitresses' relationship to the illegal gambling was 'too attenuated for them to be counted . . . as persons who conduct . . . the gambling business' under Section 1955 (671 F.2d at 402)."

In fact, the Court in Boss rested its decision that the waitresses did not conduct a gambling business on the fact that they did not perform functions "necessary to the illegal gambling business" such as making change for the gamblers, acting as security guards or guarding the door:

> Thus the Government's evidence here established only that the waitresses served drinks to the larger group in the dance hall and also to a smaller group in the dice room in the back. No showing was made that they served any other functions such as making change for gamblers in a cash game, acting as security guards, identifying customers while tending the door to a gambling room, or the like. There was no proof that they performed functions necessary to the illegal gambling business, and their relationship to it was too attenuated for them to be counted under the federal criminal statute as persons who "conduct, finance, manage, supervise, direct, or own" the gambling business. Id. at 402.

5. The Government's Memorandum on page 4 seeks to distinguish Boss on the ground that because Petitioner's services were only for the gambling operation, he cannot reasonably claim

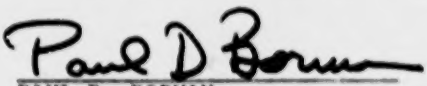
that he unknowingly or unwittingly facillitated gambling.

In fact, the Court in Boss did not assert that the waitress unknowingly or unwittingly facillitated the dice game. In both cases, it was evident that the waitresses/waiter, in providing their services to the dice games, knew that an illegal gambling operation was taking place.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

FEDERAL DEFENDER OFFICE



PAUL D. BORMAN
Attorney for Petitioner
600 Woodward Avenue
Detroit, Michigan 48226
(313) 961-4150

Dated: June 14, 1983

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6645

BUSTER FRANKLIN MERRELL, PETITIONER

V.

UNITED STATES OF AMERICA,

CERTIFICATE OF SERVICE

Paul D. BORMAN, in compliance with Supreme Court Rule 28.4(a) and 28.5(b) does hereby certify that he is a member of the Bar of the Supreme Court and that on the 14th day of June, 1983, did deposit in the United States mail, with postage fully prepaid, one (1) copy of the Petitioner's Reply to Memorandum for the United States in Opposition, addressed to the Solicitor General, Department of Justice, Washington, DC, 20530.

Paul D Borman

PAUL D. BORMAN